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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DANITA ROSS,

10 Plaintiff,

11 v.

12 NANCY A BERRYHILL, Acting
Commissioner of Social Security,

13 Defendant.

CASE NO. 3:16-CV-05903-RBL-DWC

REPORT AND RECOMMENDATION

Noting Date: May 5, 2017

14 The District Court has referred this action, filed pursuant to 42 U.S.C. § 405(g), to United
15 States Magistrate Judge David W. Christel. Plaintiff Danita Ross filed this matter seeking
16 judicial review of Defendant's denial of her application for disability insurance benefits ("DIB").

17 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
18 erred when she failed to find Plaintiff's mental impairments severe at Step Two. The ALJ also
19 failed to properly consider the medical opinion evidence of treating physicians Drs. Joseph
20 Sullivan, M.D. and Tracy Sax, M.D. Had the ALJ considered all Plaintiff's severe impairments
21 at Step Two and properly evaluated the medical opinion evidence, the residual functional
22 capacity ("RFC") may have included additional limitations. The ALJ's error is therefore harmful
23 and the Court recommends this matter be reversed and remanded pursuant to sentence four of 42
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1 U.S.C. § 405(g) to the Commissioner for further proceedings consistent with this Report and
2 Recommendation.

3 FACTUAL AND PROCEDURAL HISTORY

4 On November 11, 2013, Plaintiff filed an application for DIB, alleging disability as of
5 December 10, 2010. *See* Dkt. 9, Administrative Record (“AR”) 26. The application was denied
6 upon initial administrative review and on reconsideration. AR 26. A hearing was held before
7 ALJ Jo Hoenninger on March 30, 2016. *See* AR 43-66. In a decision dated April 22, 2016, the
8 ALJ determined Plaintiff to be not disabled. *See* AR 26-38. Plaintiff’s request for review of the
9 ALJ’s decision was denied by the Appeals Council, making the ALJ’s decision the final decision
10 of the Commissioner. *See* AR 1-5; 20 C.F.R. § 404.981, § 416.1481.

11 In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ erred by failing to: (1) find
12 Plaintiff’s mental health condition to be non-severe at Step Two; (2) properly consider the
13 medical opinion evidence; and (3) provide clear and convincing reasons for rejecting Plaintiff’s
14 subjective symptom testimony. *See* Dkt. 11, p. 1.

15 STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
17 social security benefits if the ALJ’s findings are based on legal error or not supported by
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
19 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

20 DISCUSSION

21 **I. Whether the ALJ erred by finding Plaintiff’s mental health condition did not** 22 **constitute a severe impairment at Step Two.**

23 Plaintiff asserts the ALJ erred by finding Plaintiff’s mental health condition non-severe at
24 Step Two of the sequential evaluation process. Dkt. 11, 13. Defendant asserts the ALJ properly

1 considered Plaintiff's impairments and Plaintiff merely offers a different interpretation of the
2 evidence. Dkt. 12.

3 Step Two of the administration's evaluation process requires the ALJ to determine
4 whether the claimant "has a medically severe impairment or combination of impairments."
5 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is "not severe" if it does not
7 "significantly limit" the ability to conduct basic work activities. 20 C.F.R. §§ 404.1521(a),
8 416.921(a). Regarding mental impairments, the ALJ will consider four broad functional areas:
9 activities of daily living; social functioning; concentration, persistence, or pace; and episodes of
10 decompensation. 20 C.F.R. § 404.1520a(c)(3). If the ALJ rates the degree of a claimant's
11 limitation "in the first three functional areas as 'none' or 'mild' and 'none' in the fourth area,
12 [the ALJ] will generally conclude that [the claimant's] impairment(s) is not severe, unless the
13 evidence otherwise indicates that there is more than a minimal limitation in [the claimant's]
14 ability to do basic work activities." *Id.* at (d)(1). "An impairment or combination of impairments
15 can be found 'not severe' only if the evidence establishes a slight abnormality having 'no more
16 than a minimal effect on an individual[']s ability to work.'" *Smolen*, 80 F.3d at 1290 (*quoting*
17 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (*adopting* Social Security Ruling "SSR" 85-
18 28)).

19 At Step Two, the ALJ discussed medical evidence regarding Plaintiff's mental health
20 conditions. AR 29-30. The ALJ then found Plaintiff had no limitations in the functional area of
21 activities of daily living, mild limitations in the functional areas of social functioning and
22 concentration, persistence or pace, and no episodes of decompensation. AR 30-31. The ALJ
23 determined, "[b]ecause the claimant's medically determinable mental impairment caused no
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1 more than ‘mild’ limitation in any of the first three functional areas and ‘no’ episodes of
2 decompensation which have been of extended duration in the fourth area, it was nonsevere.” AR
3 31.

4 First, the ALJ found Plaintiff had no limitations in activities of daily living because
5 Plaintiff maintains her household by delegating household chores to her mother and children,
6 drives, attends medical appointments, and has fairly complied with numerous medication trials.
7 AR 30. The evidence, however, does not support the ALJ’s finding. Plaintiff testified she has
8 four children ages 24, 15, 12, and 8. AR 48. She drives three to four times per week to go to the
9 store or take her children places. AR 49. Plaintiff delegates dish washing to her 12 and 15 year
10 old children and Plaintiff’s mother does her laundry. AR 57. Plaintiff does some grocery
11 shopping, but her mother does most of the grocery shopping and prepares meals for Plaintiff or
12 her children to put in the oven. AR 57. Plaintiff also reported to her doctor that she has manic
13 highs where she takes on “everything in the world[.]” AR 607. She then becomes overwhelmed
14 by all the activities and responsibilities and muddles through completing the tasks. AR 608. The
15 evidence shows Plaintiff’s activities of daily living are more limited than described by the ALJ.
16 Therefore, the Court finds the ALJ’s conclusion that Plaintiff has no limitations in activities of
17 daily living is not supported by substantial evidence. *See Reddick v. Chater*, 157 F.3d 715, 722-
18 23 (9th Cir. 1998) (finding an ALJ must not “cherry-pick” certain observations without
19 considering their context).

20 Second, the ALJ determined Plaintiff had mild limitations in social functioning because
21 Plaintiff isolates herself, had some difficulty dealing with her husband’s request that she get a
22 job, and was observed as somewhat irritable. AR 31. However, she had appropriate behavior,
23 dress, grooming, and hygiene at numerous medical appointments. AR 31.

1 Social functioning refers to a claimant's capacity to interact independently, appropriately,
2 effectively, and on a sustained basis with other individuals. *See* 20 C.F.R. § Pt. 404, Subpt. P,
3 App. 1 (effective Sept. 29, 2016). The evidence shows Plaintiff was pleasant and cooperative
4 during medical appointments. *See* AR 392, 400, 612. When seen by her treating psychiatrist,
5 Plaintiff had fair grooming and intact hygiene. AR 626 ,629, 633, 644, 653. However, when
6 Plaintiff is depressed as a result of her bi-polar disorder, Plaintiff will stay home, not do anything
7 or see anyone, and will not even talk to her mother. AR 608. Plaintiff reported irritability and
8 anger control fluctuation, and noted her emotional lability was interfering with her personal
9 relationships. AR 548. Dr. Jennifer Coffman, Plaintiff's treating psychiatrist, determined
10 Plaintiff's Global Assessment of Functioning ("GAF") score was 60, which indicates moderate
11 social functioning difficulties. AR 613; *Tagger v. Astrue*, 536 F.Supp.2d 1170, 1173 n.6
12 (C.D.Cal. 2008).¹ The evidence also shows Plaintiff does not attend church or other meetings,
13 and spends most of her time in her home. AR 58.

14 The ALJ did not discuss the evidence showing Plaintiff has difficulty with social
15 functioning when she is experiencing depression. Therefore, the Court cannot conclude the
16 ALJ's finding that Plaintiff has only mild limitations in social functioning is supported by
17 substantial evidence. *See Hutchinson v. Colvin*, 2016 WL 6871887, *4 (W.D. Wash., Nov. 22,
18 2016, J. Creatura) (noting the ALJ's treatment of the evidence of record at Step Two suggested
19 improper "cherry-picking" to support the ALJ's decision "while failing to address aspects of the

21 ¹ A GAF score is "a subjective determination based on a scale of 100 to 1 of 'the [mental health] clinician's
22 judgment of [a claimant's] overall level of functioning.'" *Pisciotta v. Astrue*, 500 F.3d 1074, 1076 n.1 (10th Cir.
23 2007) (citation omitted). It is "relevant evidence" of the claimant's ability to function mentally. *England v. Astrue*,
24 490 F.3d 1017, 1023, n. 8 (8th Cir. 2007). "A GAF of 51-60 indicates '[m]oderate symptoms (e.g., flat affect and
circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning
(e.g., few friends, conflicts with peers or co-workers).'" *Tagger*, 536 F.Supp.2d at 1173 n.6 (quoting American
Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Text Revision 4th ed. 2000)
("DSM-IV-TR") at 34).

1 record supporting a finding of severe limitations”); *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th
2 Cir. 1995) (an ALJ “may not reject significant probative evidence without explanation”).

3 Third, the ALJ determined Plaintiff’s migraines caused mild limitations in the area of
4 concentration, persistence, or pace. AR 31. The ALJ, however, did not discuss evidence showing
5 Plaintiff’s mental impairments caused limitations in this functional area. *See* AR 31. The record
6 shows Plaintiff’s bi-polar disorder causes low energy and concentration, and hypersomnolence.
7 AR 608. Plaintiff also reported she struggles with irritability, distractibility, not finishing
8 projects, and mood instability. AR 708. When she is manic, Plaintiff reports pressured speech
9 and mind racing. AR 608. Further, Plaintiff’s treating physician noted successful treatment of
10 Plaintiff’s depression would include improved focus. *See* AR 529.

11 There is evidence Plaintiff’s mental health condition is causing limitations in her
12 concentration, persistence, and pace. The ALJ, however, did not discuss this evidence when
13 finding Plaintiff had mild limitations in this area. Rather, the ALJ only considered Plaintiff’s
14 physical impairment of migraines, finding Plaintiff’s headache pain impacted her concentration,
15 persistence, and pace. *See* AR 31. As the ALJ did not discuss evidence related to Plaintiff’s
16 mental health condition, the Court cannot conclude the ALJ properly considered all the evidence
17 when finding Plaintiff had mild limitations in concentration, persistence, or pace. *See Flores*, 49
18 F.3d at 570-71. Therefore, the ALJ’s third finding is not supported by substantial evidence.

19 Fourth, the ALJ found Plaintiff experienced no episodes of decompensation of any kind.
20 AR 31. Plaintiff has not shown, nor does the Court find, she suffered from episodes of
21 decompensation of an extended duration. *See* Dkt. 11. Therefore, the ALJ’s fourth finding is
22 supported by substantial evidence.

1 For the above stated reasons, the ALJ failed to consider the entire record when finding
2 Plaintiff did not have a severe mental impairment at Step Two. Accordingly, the Court finds the
3 ALJ erred. The record shows Plaintiff was diagnosed with depression, bi-polar disorder, and
4 social anxiety disorder. *See e.g.* AR 544, 644. These conditions caused functional limitations.
5 *See e.g.* AR 583 (extreme limitations in social functioning due to chronic headaches, anxiety, and
6 bi-polar disorder); 608 (when depressed Plaintiff will not leave home or speak to anyone).
7 Therefore, the Court finds the Plaintiff's mental health condition is a severe impairment.

8 Harmless error principles apply in the Social Security context. *Molina v. Astrue*, 674 F.3d
9 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
10 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*
11 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
12 F.3d at 1115. The determination as to whether an error is harmless requires a "case-specific
13 application of judgment" by the reviewing court, based on an examination of the record made
14 "'without regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at
15 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (*quoting* 28 U.S.C. § 2111)).
16 If the ALJ accounts for all Plaintiff's limitations in assessing the RFC, the Step Two error is
17 harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

18 While the ALJ mentions bi-polar disorder in subsequent portions of her decision, she
19 does not discuss the limitations caused by this impairment or include any mental limitations in
20 the RFC. *See* AR 32-36. A review of the record shows the RFC assessment may have changed
21 had the ALJ properly considered Plaintiff's mental impairment at Step Two. For example, the
22 ALJ gave little weight to Plaintiff's subjective symptom testimony and the opinion of Dr. Joseph
23 Sullivan, Plaintiff's treating physician, who found Plaintiff's social functioning was extremely
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1 limited due to Plaintiff's bi-polar disorder, anxiety, and chronic headaches. *See* AR 33-36. Had
2 the ALJ properly considered Plaintiff's mental impairments at Step Two, Plaintiff's subjective
3 testimony and the opinion evidence of Dr. Sullivan may have been given additional weight and
4 additional limitations, such as limitations in social functioning, may have been included in the
5 RFC assessment and hypothetical question posed to the vocational expert, Patricia Ayerza. As
6 the ALJ's failure to properly consider Plaintiff's mental impairment severe at Step Two and
7 throughout the remaining sequential evaluation process impacts the ultimate disability decision,
8 it is not harmless.

9 The ALJ's error at Step Two requires remand to the Commissioner for proper
10 consideration of Plaintiff's severe impairments and to reconsider each of the remaining steps in
11 the administrative process incorporating Plaintiff's mental impairment and the work limitations
12 possibly caused by this additional severe impairment. As the ALJ's error at Step Two impacts all
13 aspects of the ALJ's decision, the ALJ is instructed to re-evaluate this entire matter on remand,
14 completing each step of the sequential evaluation process.²

15 **II. Whether the ALJ properly weighed the medical opinion evidence.**

16 Plaintiff argues the ALJ failed to properly consider the opinions of treating physicians
17 Drs. Joseph Sullivan, M.D. and Tracy Sax, M.D. Dkt. 11. While the ALJ's error at Step Two
18 requires the ALJ to re-evaluate this entire matter on remand, the Court specifically directs the
19 ALJ to reconsider the opinions of Drs. Sullivan and Sax because the ALJ provided conclusory
20 reasons for giving little weight to these opinions.

23 ² While the Court finds the mental impairment is severe, the Court makes no determination on how this
24 severe impairment will impact the ALJ's evaluation of the remaining sequential evaluation process, including
Plaintiff's credibility, the medical opinion evidence, and Plaintiff's RFC.

1 In March of 2016, Drs. Sullivan and Sax completed questionnaires regarding Plaintiff's
2 functional abilities. *See* AR 580-86. The ALJ discussed the findings of Drs. Sullivan and Sax and
3 gave the opinions little weight. AR 36. The ALJ stated,

4 I give little weight to the opinion of Dr. Sullivan because (1) his assessment has
5 no explanation for the limitations and (2) his opinion is inconsistent with the
6 medical evidence of record which reflects improvement. (3) Also, the functional
7 opinion of Dr. Sullivan is inconsistent with the claimant's acknowledged ability to
8 raise a family and be a foster parent.

9 AR 36 (numbering added). Regarding Dr. Sax's opinion, the ALJ stated,

10 I give little weight to the opinion of Dr. Sax because (1) his assessment has no
11 explanation for the limitations and (2) it is not consistent with the record as a
12 whole inclusive of his own records where he notes improvement in the claimant's
13 condition secondary to her compliance with treatment and medications.

14 AR 36 (numbering added).

15 "[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing
16 nothing more than ignoring it, asserting without explanation that another medical opinion is more
17 persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his
18 conclusion." *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (*citing Nguyen v.*
19 *Chater*, 100 F.3d 1462, 1464 (9th Cir.1996)). As the Ninth Circuit has stated:

20 To say that medical opinions are not supported by sufficient objective findings or
21 are contrary to the preponderant conclusions mandated by the objective findings
22 does not achieve the level of specificity our prior cases have required, even when
23 the objective factors are listed seriatim. The ALJ must do more than offer his
24 conclusions. He must set forth his own interpretations and explain why they,
rather than the doctors', are correct.

Embrey, 849 F.2d at 421-22 (internal footnote omitted).

21 The ALJ provided conclusory reasons for giving little weight to the opinions of Drs.
22 Sullivan and Sax. *See* AR 452. She failed to provide her interpretation of the evidence and she
23 did not provide a detailed explanation as to why the opinions should be rejected. The ALJ failed
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1 to explain how the opinions alleged lack of explanation warranted little weight, what evidence in
2 the record was inconsistent with the doctors' opinions, or how Plaintiff's ability to raise a family
3 was inconsistent with Dr. Sullivan's opinion. *See* AR 36. The vague, conclusory statements
4 rejecting the opinions of Drs. Sullivan and Sax do not reach the specificity necessary to justify
5 rejecting the opinions and are insufficient for this Court to determine if the ALJ properly
6 considered the evidence. Therefore, the ALJ erred. *See Embrey*, 849 F.2d at 421-22 ("it is
7 incumbent on the ALJ to provide detailed, reasoned, and legitimate rationales for disregarding
8 the physicians' findings[;]" conclusory reasons do "not achieve the level of specificity" required
9 to justify an ALJ's rejection of an opinion); *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir.
10 1989) (an ALJ's rejection of a physician's opinion on the ground that it was contrary to clinical
11 findings in the record was "broad and vague, failing to specify why the ALJ felt the treating
12 physician's opinion was flawed").

13 Had the ALJ properly consider the opinions of Drs. Sullivan and Sax, the RFC and
14 hypothetical question may have included additional physical and mental limitations. As the
15 ultimate disability decision may have changed, the ALJ's error is not harmless. *See Molina*, 674
16 F.3d at 1115.

17 **III. Whether the ALJ erred by failing to provide clear and convincing reasons**
18 **supported by the record to discount Plaintiff's subjective testimony.**

19 Plaintiff contends the ALJ failed to give clear and convincing reasons for discounting
20 Plaintiff's subjective symptom testimony. Dkt. 11, pp. 11-12. The Court concludes the ALJ
21 committed harmful error at Step Two and in assessing the medical opinion evidence. *See*
22 Sections I & II, *supra*. Because the ALJ's reconsideration of Step Two and the medical opinion
23 evidence may impact her assessment of Plaintiff's subjective testimony, the ALJ must reconsider
24 Plaintiff's subjective testimony on remand.

IV. Whether the case should be remanded for an award of benefits.

Plaintiff argues this matter should be remanded with a direction to award benefits. *See* Dkt. 11, pp. 12-13. The Court may remand a case “either for additional evidence and findings or to award benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when evidence should be credited and an immediate award of benefits directed[.]” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

The Court has determined the ALJ must re-evaluate this entire matter in light of Plaintiff's mental impairment. Further, issues remain which must be resolved concerning the medical evidence and Plaintiff's subjective testimony. Therefore, remand for further administrative proceedings is appropriate.

CONCLUSION

Based on the above stated reasons, the undersigned recommends this matter be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with this Report and Recommendation. The undersigned also recommends judgment be entered for Plaintiff and the case be closed.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
3 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
4 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
5 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on May 5, 2017,
6 as noted in the caption.

7 Dated this 14th day of April, 2017.

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10 David W. Christel
11 United States Magistrate Judge
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